

Supreme Court U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

May Term, A.D., 1979

No. 78-1349

OTTO KERNER, by Anton Kerner, his representative,
Petitioner,

v.

STATE EMPLOYEES' RETIREMENT SYSTEM OF ILLINOIS,
ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ILLINOIS**

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Otto Kerner, by Anton Kerner, his representative, the
petitioner herein, prays that a Writ of Certiorari issue
to review the judgment of the Illinois Supreme Court
entered in the above-entitled cause on September 19, 1978.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported

at 72 Ill. 2d 507, 382 N.E. 2d 243, 21 Ill. Dec. 879, and is printed in Appendix A hereto, infra, page 1. The judgment of the Appellate Court of the Fourth District of Illinois, is printed in Appendix A hereto, infra, page 8. Said opinion is reported at 53 Ill. App. 3d 747, 368 N.E. 2d 1118, 11 Ill. Dec. 510. The Journal Entry of Judgment of the Circuit Court for the Seventh Judicial Circuit of Illinois, Sangamon County, is printed in Appendix A hereto, infra, page 19. The Order of the State Employees' Retirement System of Illinois is printed in Appendix A hereto, infra, page 22. The Decision of the Hearing Officer of the State Employees' Retirement System of Illinois is printed in Appendix A hereto, infra, page 25.

JURISDICTION

The judgment of Supreme Court of Illinois (Appendix A, infra, page 1) was entered on September 19, 1978. A timely petition for rehearing was denied on December 1, 1978. (Appendix A, infra, page 7). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I.

Whether §14-199 of the Illinois Pension Code (Ill. Rev. Stat. 1975, ch. 108½, §14-199) violates the due process clause of the XIV Amendment of the Constitution of the United States.

II.

Whether §14-199 of the Illinois Pension Code (Ill. Rev. Stat. 1975, ch. 108½, §14-199) violates the United States' Constitution's VIII Amendment prohibition of cruel and unusual punishment.

III.

Whether the manner in which the Supreme Court of

Illinois reviewed this cause violated the due process clause of the XIV Amendment of the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VIII — Constitution of the United States:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Amendment XIV — Constitution of the United States:

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. . . .

Section 3. . . .

Section 4. . . .

Section 5. . . .”

Ill. Rev. Stat. 1975, ch. 108½, §14-199:

“14-199. §14-199. Felony conviction. None of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as an employee.

This section shall not operate to impair any contract or vested right heretofore acquired under any law or laws contained in this Article nor to preclude the right to a refund.

“All future entrants entering service subsequent to July 9, 1955 shall be deemed to have consented to

the provisions of this section as a condition of coverage."

Ill. Rev. Stat. 1975, ch. 108½, §14-102:

"14-102. §14-102. Purpose. The purpose of the system is to provide an orderly means whereby aged or disabled employees may be retired from active service, without prejudice or hardship, and to enable the employees to accumulate reserves for themselves and their dependents for old age, disability, death and termination of employment, thus effecting economy and efficiency in the administration of the State Government."

STATEMENT OF CASE

On September 28, 1965, Otto Kerner (herein for convenience referred to as "Kerner"), then Governor of Illinois, applied for membership in the State Employees' Retirement System (herein for convenience referred to as "System"). Under the option then existing, Kerner paid into the System \$11,048.34, which included 4% compound interest, and obtained service credits retroactively to the date of his taking office, viz., January 9, 1961.

On May 19, 1968, Kerner resigned as Governor to become a Judge of the United States Court of Appeals for the Seventh Circuit, and on May 2, 1969, applied for a retirement allowance. On June 16, 1969, the System granted the allowance retroactively to January 19, 1969, by paying \$1,534.88, and thereafter monthly allowances of \$335.08 each, through June, 1973. At the time of the initial payment Kerner was notified that his contributions to the System, excluding interest, totalled \$16,815.71. Payments were stopped commencing with the month of July, 1973; three additional payments were made at various times thereafter, and Kerner's total payments from the System are agreed to be \$18,927.82.

Kerner was convicted of one or more felonies under the United States Code in the United States District Court for the Northern District of Illinois, Eastern Division. These convictions were affirmed on appeal.

On October 3, 1975, Kerner filed a demand with the System for resumption of payments. A hearing was convened before a hearing officer, who rendered his decision on April 26, 1976, recommending such resumption. On May 3 and 5, 1976, the board of trustees of the System reviewed the hearing officer's report, held further hearings and overruled the hearing officer.

Kerner died in May, 1976, and his representative filed an administrative review proceeding in the Circuit Court of Sangamon County, Illinois, asking in effect that the finding of the System be reversed and Kerner's estate be awarded payments from July, 1973, through May, 1976, totaling \$9,382.24. The Circuit Court reversed the System. The Appellate Court for the Fourth District of Illinois, however, reversed the Circuit Court. The Supreme Court of Illinois granted leave to appeal and affirmed the Appellate Court.

When the Illinois Supreme Court granted the petition for leave to review, there was no indication that any of the seven justices of the Illinois Supreme Court did not participate in the decision to grant review. All seven justices heard oral arguments in the cause. However, when the written opinion was issued, there was a notation that three of the justices, including the Chief Justice, had taken no part in the consideration or decision of the case. No explanation as to why these justices recused themselves or at what point in the cause these justices recused themselves was offered. Again, when notice that the petition for rehearing had been denied was issued, there was a notation that the same three justices had taken no part, even though petitioner had raised the question in his petition for rehearing as to whether the procedure employed by the Illinois Supreme Court violated petitioner's right to due process of law, as guaranteed by the XIV Amendment of the United States Constitution.

Petitioner has, from the first, asserted that §14-199 of the Illinois Pension Code (Ill. Rev. Stat. 1975, ch. 108½, §14-199) violates both the cruel and unusual punishment prohibition of the VIII Amendment of the Constitution of the United States and the due process clause of the

XIV Amendment of the Constitution of the United States. The Circuit Court of Sangamon County, Illinois, found:

"that the statute, namely, §14-199, Chap. 108½, Ill. Rev. Stat., 1975, is unconstitutional as to the Plaintiff, Otto Kerner, as a violation of his rights under the United States Constitution . . ."

The Appellate Court for the Fourth District of Illinois, held that the VIII Amendment is applicable only to criminal proceedings, not civil proceedings. The Illinois Appellate Court also termed petitioner's claims that the statute in question violated the due process clause of the XIV Amendment of the Constitution of the United States as "untenable."

And the Illinois Supreme Court, noting that it had reviewed petitioner's claims relating to cruel and unusual punishment and due process, stated:

"We hold that the termination of payments here violates none of these provisions."

REASONS FOR GRANTING REVIEW

I.

Section 14-199 of the Illinois Pension Code (Ill. Rev. Stat., 1975, Ch. 108½, §14-199) violates the due process clause of the XIV Amendment of the United States Constitution.

The effect of §14-199 of the Illinois Pension Code (Ill. Rev. Stat., 1975, Ch. 108½, §14-199) is to deny petitioner a property right. Because petitioner was convicted of a "felony relating to or arising out of or in connection with his service as an employee [of the State of Illinois]," petitioner was denied his pension benefits. By definition, pension rights represent earned deferred compensation for which the state employee rendered legitimate services.

What is the object sought to be attained by the Illinois General Assembly in enacting §14-199? Perhaps it is well first to consider what the purpose of the Illinois State Legislature was in enacting the "State Employees' Retire-

ment System of Illinois." The purpose underlying creation of the System is codified in §14-102 of the Illinois Pension Code (Ill. Rev. Stat., 1975, Ch. 108½, §14-102):

"14-102. §14-102. Purpose. The purpose of the system is to provide an orderly means whereby aged or disabled employees may be retired from active service, without prejudice or hardship, and to enable the employees to accumulate reserves for themselves and their dependents for old age, disability, death and termination of employment, thus effecting economy and efficiency in the administration of the State Government."

How, then, does the legislative purpose underlying the enactment of the System relate to the legislative purpose underlying §14-199? According to the Fourth District Appellate Court of Illinois:

"We are of the opinion that the principal purpose of the statute [Section 14-199] is to penalize work-related felonies."

Although the construction of that sentence is somewhat awkward (clearly, work-related felonies cannot in and of themselves be penalized), what the Illinois Appellate Court was apparently trying to convey is that §14-199 serves to penalize public employees who are convicted of work-related felonies. At the same time, the Illinois Appellate Court criticized the respondent herein for its "pious moralizing" in urging "that Kerner should not be rewarded for his bad acts."

Every public employee "who is convicted of any felony relating to or arising out of or in connection with his service as an employee" is penalized by being denied his pension benefits. Denial of pension benefits certainly does not effect "economy and efficiency in the administration of the State Government." Denial of pension benefits clearly works "prejudice or hardship" for those aged or

disabled public employees retired from active service. Public employees who are denied pension benefits are without the accumulated "reserves for themselves and their dependents for old age, disability, death and termination of employment." And the denial of pension benefits certainly cannot be termed "orderly." Everything contained in §14-199, then, is at odds with the legislative purpose expressed in §14-102.

Pension rights are earned deferred compensation — property rights. Pension rights are established when public employees render legitimate services to the State over a period of time. Section 14-199 denies earned deferred compensation (pension rights) to any public employee convicted of a work-related felony — regardless of whether the act or acts which formed the basis for the felony conviction also served to enable the employee to obtain his pension rights. As such, §14-199 violates the guarantees of due process of law established in the XIV Amendment of the Constitution of the United States. In §14-199, the legislature has arbitrarily created a classification of public employees convicted of work-related felonies who, because of their convictions, are denied pension rights, which pension rights constitute earned deferred compensation for services legitimately rendered. Section 14-199 penalizes *any* public service employee convicted of a work-related felony, without regard to whether that individual obtained his pension rights either wholly or partially through his own wrongdoing.

The statute does not penalize public service employees who are convicted of work-related misdemeanors. The statute does not penalize public service employees who are not prosecuted for work-related felonies, because the statute of limitations has run. The statute does not penalize public-service employees who, though initially charged with work-related felonies, enter into plea negotiations whereby a plea of guilty is entered to a charge of a work-related

misdemeanor, thereby avoiding the effects of §14-199. Accordingly, §14-199 is arbitrary in its classification and the distinction it creates does not have a reasonable basis when considered in relation to the purposes of the over all legislation as outlined in §14-102.

The peculiar rule imposed by §14-199 upon public service employees *convicted* of work-related felonies is that these employees lose their pension rights, even though taking pension rights away from these individuals is at odds with every listed legislative purpose found in §14-102 and even though individuals convicted of work-related misdemeanors or precluded from prosecution by the statute of limitations are not denied their pension rights. Further, the class created by §14-199 is the "artificial" class of public-service employees convicted of work-related felonies, without regard to whether these employees obtain their pension rights through their wrong-doing and without regard to the fact that these employees performed legitimate services for the State of Illinois for which their pension rights represent earned deferred compensation.

Accordingly, petitioner respectfully submits that §14-199 of the Illinois Pension Code violates the due process clause of the XIV Amendment of the Constitution of the United States.

II.

Section 14-199 of the Illinois Pension Code violates the United States' Constitution's VIII Amendment prohibition of cruel and unusual punishment.

Denial of petitioner's pension rights came as a direct result of his conviction of a felony or felonies in Federal Court. The denial of Otto Kerner's pension rights constitutes punishment. The fact that the punishment comes about as the result of a civil proceeding instead of a criminal proceeding does not mean that denial of his pension rights is not punishment. Otto Kerner was denied his pension rights in addition to being imprisoned and fined.

His pension rights were taken away from him even though they constituted earned deferred compensation for past services legitimately rendered to the State of Illinois. His pension rights were denied him without any inquiry as to whether those pension rights were obtained fraudulently or illegally.

As this Court acknowledged in *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L. Ed. 793, at 799:

"What constitutes a cruel and unusual punishment has not been exactly decided."

This Court continued at page 801:

"Time works changes, brings into existence new conditions and purposes. Therefore a principal, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."

The Constitution:

" . . . may acquire meaning as public opinion becomes enlightened by a humane justice." (54 L. Ed. 793 at 803)

Public opinion enlightened by humane justice dictates that the denial of pension benefits as a result of conviction of work-related felony be deemed a violation of the VIII Amendment's prohibition of cruel and unusual punishment when the public service employee, as a result of the felony conviction, has already been incarcerated and fined; especially in view of the fact that his pension benefits represent earned deferred compensation for services legitimately rendered as a public employee.

III.

The manner in which the Illinois Supreme Court reviewed this cause violates the due process clause of the XIV Amendment.

Although review by the Illinois Supreme Court was within the discretion of the Court in this cause, once the Illi-

inois Supreme Court granted petitioner's petition for leave to review, petitioner's right to have the review conducted in accord with the XIV Amendment's guarantee of due process attached. When his petition for leave to review was granted by the Illinois Supreme Court, there was no indication that any of the justices did not participate in the decision as to whether or not to review the case.

All of the Illinois Supreme Court Justices were present and participated in oral argument in this cause. Not until the written decision was rendered did petitioner learn that three of the seven justices, including the Chief Justice, had taken no part in the consideration or decision of this case. And, again, when Petitioner received notice that his petition for rehearing had been denied, the notice contained the statement, "Chief Justice Ward, Mr. Justice Clark, and Mr. Justice Moran took no part."

Petitioner respectfully contends that the three justices removing themselves from consideration of the cause should have communicated such fact to the parties at the time the petition for leave to appeal was granted.

Fundamental fairness required those Justices to excuse themselves from oral argument in the cause. Procedural due process, as guaranteed by the XIV Amendment, dictated that the parties to the cause know the composition of the Court to which their arguments were directed.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

TERRY L. FIELDS
Of Counsel

February 26, 1979.

APPENDIX 1

OPINION

SUPREME COURT OF ILLINOIS

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the eleventh day of September in the year of our Lord, one thousand nine hundred and seventy-eight, within and for the State of Illinois.

BE IT REMEMBERED, that afterwards, to-wit, on the 19th day of September, 1978 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Otto Kerner, etc., No. 50239 State Employee's Retirement System of Illinois; et al., etc.,	vs. Appellant, Appellees.	Appeal from Appellate Court
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Docket No. 50239—Agenda 56—May 1978.

ANTON KERNER, Appellant, v. STATE EMPLOYEES' RETIREMENT SYSTEM OF ILLINOIS et al., Appellees.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

The question on this appeal concerns the effect of a felony conviction upon the pension rights of the late Otto Kerner, Jr., former Governor of Illinois. The facts, which are undisputed, are included in the opinion of the appellate court (53 Ill. App. 3d 747) and will be restated here only so far as necessary for an understanding of our opinion.

In 1965, during his service as Governor, Otto Kerner applied for and was accepted into membership in the State Employees' Retirement System (hereinafter System) and

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by paying some \$11,000 secured credit for his prior gubernatorial service. Following his 1968 resignation as Governor to accept appointment as a Federal judge, he applied for and was granted retirement benefits and subsequently received monthly pension checks. He was thereafter convicted of several felonies under the United States Code (see *United States v. Isaacs* (7th Cir. 1974), 493 F.2d 1124, *cert. denied* (1974), 417 U.S. 976, 41 L. Ed. 2d 1146, 94 S. Ct. 3183), which were related to his service as Governor. His monthly pension allowances were terminated by the System because of those convictions, resulting in a demand by him for resumption of pension payments and for all arrearages and benefits. The System, claiming that the convictions caused a loss of all rights in the pension plan except the right to a refund of the lump-sum payment and monthly contributions, filed a counterclaim seeking repayment of the difference between the total benefits paid and the amounts contributed by him.

A hearing officer appointed by the secretary of the System recommended resumption of the pension payments and payment of all arrearages and benefits. The board of trustees of the System, however, rejected the hearing officer's recommendation and voted to refuse any further payments. Further, the board remanded the cause to the hearing officer for a determination concerning the System's counterclaim. Following Otto Kerner's death, his representative filed an administrative review proceeding in the circuit court of Sangamon County (Ill. Rev. Stat. 1975, ch. 108½, par. 14-200; ch. 110, par. 264 *et seq.*) attacking the board's termination of the monthly pension payments. The circuit court reversed the board and ordered payment of all arrearages and benefits accruing prior to Otto Kerner's death. The Appellate Court for the Fourth District, however, reversed the circuit court (53 Ill. App. 3d

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747), effectively affirming the decision of the board of trustees. We granted leave to appeal. We note that the System's counterclaim for repayment of the amount paid to Otto Kerner in excess of his contributions is not included in this appeal.

The primary question presented is the construction of section 14-199 of the Illinois Pension Code:

"None of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as an employee.

This section shall not operate to impair any contract or vested right heretofore acquired under any law or laws continued in this Article nor to preclude the right to a refund.

All future entrants entering service subsequent to July 9, 1955 shall be deemed to have consented to the provisions of this section as a condition of coverage." (Ill. Rev. Stat. 1975, ch. 108½, par. 14-199.)

In construing this statute, as with any statute, our objective is to ascertain and give effect to the legislative intent as determined from the necessity or reason for the enactment and the meaning of the words employed. *In re Roberts Park Fire Protection District* (1975), 61 Ill. 2d 429, 437-38.

Plaintiff first contends that the phrase "convicted of any felony" refers only to convictions of crimes which are felonies under Illinois law, and that since the convictions were actually violations of Federal law, not Illinois law, they are not within the statutory description of "any felony." We disagree. When faced with an analogous question in the context of a Federal statute, the United States Supreme Court chose a broad interpretation of the word "any":

"Nor can we hold that the Act bars use of commit-

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tee testimony in United States courts but not in state courts. The Act forbids use of such evidence 'in any criminal proceeding *** in any court'. Language could be no plainer. Even if there could be legislative history sufficiently strong to make 'any court' mean United States courts only, there is no such history. The few scraps of legislative history pointed out tend to indicate that Congress was well aware that an ordinary person would read the phrase 'in any court' to include state courts. To construe this phrase as having any other meaning would make the Act a trap for the unwary." (*Adams v. Maryland* (1954), 347 U.S. 179, 181-82, 98 L. Ed. 608, 612, 74 S. Ct. 442, 445.)

There is similar authority from this court that, absent contextual implications to the contrary, a broad interpretation of the word "any" is to be favored. *E.g., Patteson v. City of Peoria* (1944), 386 Ill. 460, 464-65; *People ex rel. Ocean Accident & Guarantee Corp. v. VanCleave* (1900), 187 Ill. 125, 134-35.

In our judgment the legislature's choice of the word "any" evinces an intent to include all felonies, State or Federal, so long as the offense was a "felony relating to or arising out of or in connection with" service as a State employee. "The language of the [Illinois Pension] Code is clear and there is no need for this court to construe it so as to give it any meaning other than the one which is clearly stated. It is the duty of the court to enforce the law as enacted according to its plain and unmistakable provisions." (*Peterson v. Board of Trustees* (1973), 54 Ill. 2d 260, 264.) This literal interpretation accords with the obvious purpose of the statute, to discourage official malfeasance by denying the public servant convicted of unfaithfulness to his trust the retirement benefits to which he otherwise would have been entitled. This construction accords, too, with the related purpose of implementing the public's right to conscientious service from those in govern-

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mental positions. In view of this legislative goal it seems to us plainly immaterial whether the felony involved is defined by the laws of this State, a sister State, or the Federal government as long as it arose from, was connected with, or related to the State service; that it was so related here is undisputed. We believe the offenses of which Otto Kerner was convicted are clearly felonies within the ambit of section 14-199.

Plaintiff also contends that because Otto Kerner's rights were vested, at least by the time preceding his convictions when he began receiving monthly payments, they were "heretofore acquired" within the meaning of the second paragraph of section 14-199 and thus could not be impaired by this statute. Our reading of the statute, however, indicates the phrase "heretofore acquired" means acquired prior to the enactment of the felony provision and does not refer to the date of vesting or contracting in the case of each individual member. This second paragraph protects the right of employees whose pension rights had vested before the 1955 enactment of this provision. It is not applicable to Otto Kerner, whose pension rights vested long after the section's effective date. The flaw in plaintiff's reading of the statute was emphasized by the appellate court when it noted that under plaintiff's theory, an employee need only retire prior to his conviction of a felony in order to render the entire statute meaningless. (53 Ill. App. 3d 747, 751.) Certainly such easy circumvention of the law's purpose cannot have been intended.

We believe section 14-199 is clearly applicable here and by its terms operated to deny Otto Kerner the retirement benefits to which he would have been entitled, absent the convictions, under the Illinois Pension Code. Plaintiff urges, however, that this conclusion renders the statute

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unconstitutional under article XIII, section 5, of the Illinois Constitution of 1970, which provides:

"Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

The difficulty with plaintiff's position is that the very section of the Constitution upon which he relies provides that membership in the retirement system is "an enforceable contractual relationship." Section 14-199 was, of course, in effect years before Otto Kerner became a member of the retirement system, and it became, by its terms, a condition of the contractual relationship to which he consented by applying for membership. As the commentary accompanying the Constitution states: "Of course, the 'contractual relationship' is governed by the actual terms of the contract or pension." (Ill. Ann. Stat., 1970 Const., art. XIII, sec. 5, Constitutional Commentary, at 302 (Smith-Hurd 1971).) Plaintiff does not explain how enforcement of this condition, to which the parties agreed and which has existed throughout the duration of the contract, can become an unconstitutional impairment of the benefits of that contract. (See *In re Roberts Park Fire Protection District* (1975), 61 Ill. 2d 429, 441.) Membership in the System was sought with knowledge of this condition, and it clearly cannot be said to impair or diminish the benefits within the meaning of the constitutional provision.

We have also reviewed plaintiff's claims relating to corruption of blood and forfeiture of estate (Ill. Const. 1970, art. I, sec. 11), cruel and unusual punishment (U.S. Const., amend. VIII), and due process (Ill. Const. 1970, art. I, sec. 2; U.S. Const., amends. V, XIV). We hold that

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the termination of payments here violates none of these provisions.

Accordingly, the judgment of the appellate court sustaining the Board's denial of pension benefits is affirmed.

Judgment Affirmed

WARD, C.J., and CLARK and MORAN, JJ., took no part in the consideration or decision of this case.

December 1, 1978

The Supreme Court today denied the petition for rehearing in the above entitled cause. Chief Justice Ward, Mr. Justice Clark and Mr. Justice Moran took no part.

Very truly yours,

/s/ Clell L. Wood
Clerk of the Supreme Court

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE FREDERICK S. GREEN Presiding Judge
HONORABLE ALBERT G. WEBBER III Judge
HONORABLE JOHN T. REARDON Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 21st day of October A.D. 1977, there was filed in the office of the Clerk

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of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 14306

Agenda No. 77-496

OTTO KERNER, by ANTON KERNER, his representative,

Plaintiff-Appellee,

v.

STATE EMPLOYEES' RETIREMENT SYSTEM OF ILLINOIS; ELLIOTT EPSTEIN, Director of Finance of the State of Illinois and Trustee and Acting Chairman of the Board of Trustees of the State Employees' Retirement System of Illinois; GEORGE LINDBERG, Comptroller of the State of Illinois and Trustee of the Board of Trustees of the State Employees' Retirement System of Illinois; CLASCENNA HINTON HARVEY, Trustee of the Board of Trustees of the State Employees' Retirement System of Illinois; MICHAEL L. MORY, Secretary of the Board of Trustees of the State Employees' Retirement System of Illinois; and ALAN J. DIXON, Treasurer of the State of Illinois and Treasurer of the State Employees' Retirement System of Illinois,
Defendants-Appellants.

MR. JUSTICE WEBBER delivered the opinion of the court:

This appeal involves the state pension rights of the late Otto Kerner, one-time governor of Illinois.

The essential facts are not in serious dispute. On September 28, 1965, Otto Kerner (herein for convenience referred to as "Kerner"), then Governor of Illinois, applied for membership in the State Employees' Retirement System (herein "System"). Under an option then existing, Kerner paid into the System \$11,048.34, which included 4% compound interest, and obtained service credits retroactively to the date of his taking office, *viz.*, January 9, 1961.

Appeal from
Circuit Court
Sangamon County
299-76

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On May 19, 1968, Kerner resigned as Governor to become a Judge of the United States Court of Appeals for the Seventh Circuit, and on May 2, 1969, applied for a retirement allowance. On June 16, 1969, the System granted the allowance retroactively to January 19, 1969, by paying \$1,534.88, and thereafter monthly allowances of \$335.08 each, through June 1973. At the time of the initial payment Kerner was notified that his contributions to the System, excluding interest, totalled \$16,815.71. Payments were stopped commencing with the month of July 1973; three additional payments were made at various times thereafter, and Kerner's total payments from the System are agreed to be \$18,927.82.

Kerner was convicted of one or more felonies under the United States Code in the United States District Court for the Northern District of Illinois, Eastern Division. These convictions were affirmed on appeal. They related to Kerner's service as an employee of the State of Illinois.

On October 3, 1975, Kerner filed a demand with the System for resumption of payments. A hearing was convened before a hearing officer, who rendered his decision on April 26, 1976, recommending such resumption. On May 3 and 5, 1976, the board of trustees of the System reviewed the hearing officer's report, held further hearings and overruled the hearing officer.

Kerner died in May 1976, and his representative filed an administrative review proceeding in the circuit court of Sangamon County, asking in effect that the finding of the System be reversed and Kerner's estate be awarded payments from July 1973, through May 1976, totaling \$9,382.24. The circuit court reversed the System and this appeal ensued.

Fundamental and central to the solution of the problem

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presented is the construction of section 14-199 of the Illinois Pension Code (Ill. Rev. Stat. 1975, ch. 108½, par. 14-199). Equally fundamental is the effect, if any, upon section 14-199 of article XIII, section 5, of the Illinois Constitution of 1970.

The statutory section in question, section 14-199, reads as follows:

"None of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as an employee.

This section shall not operate to impair any contract or vested right heretofore acquired under any law or laws continued in this Article nor to preclude the right to a refund.

All future entrants entering service subsequent to July 9, 1955 shall be deemed to have consented to the provisions of this section as a condition of coverage."

Ill. Rev. Stat. 1975, ch. 108½, par. 14-199.

This provision first appeared in 1955 as paragraph 216.2 of chapter 127, Ill. Rev. Stat., and became effective July 9, 1955. In 1963 the legislature codified various pension plans into what is now chapter 108½, Ill. Rev. Stat., and the section was incorporated therein without change except to add to it the words, "subsequent to July 9, 1955."

Before proceeding further, we must lay to rest one matter raised in the briefs. Kerner's brief spends a considerable amount of time and space arguing the proposition that a pension is a contractual right, not a bounty. This is conceded by the System. Some early cases, decided when pension plans were much less common than today, contain language which at least look in the direction of bounty or grace-and-favor, alterable at the will of the sovereign. More recent authority has totally rejected such thinking and pensions are now acknowledged to be contractual in

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nature. (See *Peterson v. Board of Trustees of Firemen's Pension Fund* (1973), 54 Ill. 2d 260, 296 N.E. 2d 721.) Kerner's pension was a contract right and became vested in 1969 when the System granted him an allowance. The actual date of vesting is of little importance since the statute in question was in force at all times since 1955.

In construing the statute the trial court held that until retirement an employee's rights were inchoate, but upon actual retirement such rights became vested. The court read the words "heretofore acquired" in paragraph 2 of section 14-199 of the Pension Code as relating to the date of retirement. Such a construction totally ignores the impact of paragraph 3.

A reading of the statute as passed in 1955 and a further reading of it as amended in 1963 demonstrate clearly that the legislature intended a change in the pension contract for those retiring after July 9, 1955. Paragraph 2 is, in effect, a saving clause and acknowledges that the legislature could not constitutionally impair a previously acquired contract right. "Heretofore" in the 1955 act could only refer by logic and grammar to a time prior to July 9, 1955; all "future entrants" (i.e., those after July 9, 1955) are deemed to have consented to the felony divestiture provision as part of the pension contract. The amendment of 1963 further underscores the importance of the date.

The legislative intent is clear: Rights acquired prior to July 9, 1955, could not be divested or impaired and no effort was made to do so; rights acquired after July 9, 1955, could be divested, since the felony conviction condition became part of the pension contract. It is a prime example of a condition subsequent, a familiar feature of contract law.

To pursue the theory of the trial court to its logical

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conclusion, all an employee need do is to conceal his criminal activity until after retirement and thus render the entire statute meaningless.

In *Peterson v. Board of Trustees of Firemen's Pension Fund*, 54 Ill. 2d 260, 264-65, 296 N.E.2d 721, , the court said:

"The language of the Code is clear and there is no need for this court to construe it so as to give it any meaning other than the one which is clearly stated. It is the duty of the court to enforce the law as enacted according to its plain and unmistakable provisions. [Citation.] The legislature could have provided pensions for fire fighters or other full-time appointed employees of the fire department who are no longer capable of performing the duties of their positions because of physical incapacity. It did not do so. We cannot now alter the plain language of the statute and through judicial construction incorporate such a provision in the Code. [Citation.]"

The doctrine applies with force to the case at bar. The statute is plain and clear: Those acquiring pension rights prior to July 9, 1955, may not have them divested by conviction of a felony; those acquiring pension rights after July 9, 1955, forfeit such rights upon such conviction. Any other interpretation tortures the statute and contorts it into an unrecognizable melange. The trial court was in error in its construction.

Since we have decided that the trial court misconstrued the statute, we must next consider the meaning of "any felony." The trial court found that the felonies of which Kerner was convicted were within the ambit of the statute. The System asserts that since no cross-appeal was taken from this finding, the matter is not properly before this court. *Village of Arlington Heights v. National Bank of Austin* (1st Dist. Gen. No. 76-762 (1977)), Ill. App. 3d ,

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N.E.2d , holds that a specific negative finding below against an appellee is not before an appellate court unless cross-appealed. However, in view of our finding that the trial court erred in construing "heretofore acquired," we must examine the other proposition because, should we also find error in construing "any felony," and find that the felonies involved here are not within the ambit of the statute, the decision of the trial court could be upheld, although not its reasoning.

Since this appears to be a case of first impression, we have no direct precedents to aid us. Kerner lays emphasis on an unpublished opinion of the Attorney General of Illinois to the Director of the Department of Registration and Education under date of February 15, 1966. The subsequent history of that opinion is detailed in *Bruni v. Dept. of Registration and Education* (1974), 59 Ill. 2d 6, 319 N.E.2d 37, cert. denied, 421 U.S. 914. The Attorney General narrowly construed the meaning of "conviction of a felony" in the Medical Practice Act. The legislature responded at its next session by broadening the meaning. The supreme court held that where a court (or the Attorney General by analogy) construes the terms of a statute and the legislature thereafter defines those terms, the decision is presumptively not in accordance with the intent of the legislature.

We are not so presumptuous as to say what the legislature might do in the event we should narrowly construe "any felony" in the case at bar, but the career of the General's opinion of February 15, 1966, is at least *prima facie* evidence that such an opinion would be destined for short tenure.

We are of the opinion that the principal purpose of the statute is to penalize work-related felonies. The structure of government has become so complex in recent times and

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the functions of state, Federal and local governments so intertwined and enmeshed as to make the Cretan labyrinth look like an interstate highway. The proliferation of Federal laws, offenses and punishments is a matter of common knowledge and is so extensive that the hoary aphorism of "the Federal case" has lost its meaning. The plain meaning of the statute relates to felonies "relating to or arising out of or in connection with" service, not as against any particular sovereign. It does not strain credulity to envision that, given the nature of the Federal intrusion into state affairs, most of the felonies likely to arise under the statute will be Federal in nature.

We are further persuaded that "any felony" as used in the statute includes Federal offenses by the specific holding in *Bruni* wherein a Federal felony which was only a misdemeanor under state law was held to be a felony under the Medical Practice Act.

The trial court was correct in holding that Kerner's offenses were felonies under section 14-199 of the Pension Code.

We turn next to the principal constitutional question raised in this appeal. After making its interpretation of the statute as detailed above, the trial court then further found that if its interpretation were in error, then the statute was unconstitutional as to Kerner in that it "divests or diminishes or impairs a vested interest." While the order of the trial court refers to both the Constitution of the United States and the Constitution of the State of Illinois, we believe that the main emphasis was on the Illinois Constitution of 1970 which provides in article XIII, section 5:

"Membership in any pension or retirement system of the State, or any unit of local government or school district, or any agency or instrumentality thereof,

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shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

This section is new, the 1870 Constitution having contained no similar provision. Furthermore, the section was offered from the floor in the Constitutional Convention and hence we do not have the benefit of reports from which to glean the intent of the framers. However, the record of proceedings of the Convention sheds some light on the matter.

The delegates were concerned that there should be adequate funding of state and local pension systems (IV Record of Proceedings Sixth Illinois Constitutional Convention, 2926-27, July 21, 1970). In connection with that debate, delegate Kinney, a co-sponsor of the provision stated:

"Mrs. Kinney: Thank you, Mr. Green and I did discuss the term 'vesting' with Mr. Kanter, the counsel to the Committee on Style and Drafting, and we thought that it would be quite fair if a person undertook employment under a statute that provided for a contingency for lowering the benefits at some future time, that this was, indeed, the contract that he had accepted. All we are seeking to do is to guarantee that people will have the right that were in force at the time they entered into the agreement to become an employee, and as Mr. Green has said, if the benefits are \$100 a month in 1971, they should be not less than \$100 a month in 1990." (IV Record of Proceedings Sixth Illinois Constitutional Convention, 2931-32.)

It is thus apparent that the framers recognized circumstances under which a pension might be reduced, and by extension of reasoning, divested altogether.

The hearing officer cited *Ballard v. Board of Trustees* (1974), Ind. App. , 313 N.E.2d 351, and as basis for his decision, and while not citing it specifically, the

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trial court's decision appears to adopt its rationale. By way of supplemental authority filed by the System we are informed that the Indiana Supreme Court has overruled its appellate court in the *Ballard* case. (*Ballard v. Board of Trustees* (1975), 263 Ind. 79, 324 N.E.2d 813, *appeal dismissed*, 423 U.S. 806.) The Indiana court, while seeming to hold the pension as a gratuity, held that even if a contractual theory were adopted, nevertheless such pension was subject to statutory reservations and could be divested. The appellate court decision in *Ballard* is inapposite.

Kerner also relies on *Leonard v. City of Seattle* (1972), 81 Wash. 2d 479, 503 P.2d 741. Apart from the fact that the Washington statute is distinguishable from the Illinois, the facts reveal that the felony was committed some four years after retirement. The Washington court held that the felony did not occur in the course of the employee's duties and hence the pension could not be terminated. *Leonard* is likewise unpersuasive here.

Article XIII, section 5, is largely derived from the New York Constitution of 1940 and the Illinois Supreme Court has looked to the decisions of that state in construing the provision in question here. (*Peters v. City of Springfield* (1974), 57 Ill. 2d 142, 311 N.E.2d 107.) We may therefore look to New York for guidance.

In *Holz v. Kowal* (1967), 27 App. Div. 2d 128, 276 N.Y.S. 2d 398, a situation analogous to the case at bar arose. The New York pension law had for a long time prohibited a pensioner from taking certain types of public employment and still continue to draw his allowance. One such pensioner sued and claimed that such prohibition was unconstitutional under the section similar to Illinois' article XIII, section 5. The court held that the prohibition antedated the constitutional provision and continued thereafter,

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and hence was not affected by the adoption of the 1940 Constitution.

The instant case is strikingly similar. When Kerner entered the System, the felony provision was in existence as part of the pension contract. The adoption of the 1970 Constitution could not impair any obligations nor remove any disabilities existing in that contract.

We hold that the adoption of article XIII, section 5, of the Constitution of 1970 neither abrogated nor modified section 14-199 of the Illinois Pension Code.

Kerner also makes several claims under the Constitution of the United States which we shall consider briefly. First, that the denial of pension rights is cruel and unusual punishment under amendment VIII. This right has been everywhere held to apply to criminal, not civil proceedings. (See *Robbins v. Police Pension Fund* (S.D.N.Y. 1973), 321 F. Supp. 93.) It has no relevancy here. Second, that the denial was an *ex post facto* law in violation of article I, sections 9 and 10 of the United States Constitution and article I, section 16, of the Illinois Constitution of 1970. The claim has no merit since the statute had been in existence nearly six years before Kerner's employment commenced in 1961. Third, Kerner claims lack of due process but cites no authority for the proposition. The claim is untenable. Procedurally he was granted adequate hearing and review. Substantively it is uncontested that he was entitled to a refund of all contributions over what he had paid in. Fourth, claim is made under article I, section 11, of the Illinois Constitution of 1970, concerning corruption of blood or forfeiture of estate. It is likewise groundless; no estate was forfeited, only a right to continued pension benefits by reason of his actions. The corruption cases turn generally on the question of whether the individual enlarges his own estate or profits from his

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own wrong. Neither is present here. The System urges that Kerner should not be rewarded for his bad acts. This is in the nature of some pious moralizing and has no persuasiveness in view of the specific language of section 14-199.

The additional constitutional claims are without foundation.

Finally, Kerner claims that the action of the System was *ultra vires*. The contention appears to ground itself on an allegation that the board of trustees had no chairman and held no meetings between May 1973, and June 1974. Under the authority of *Arlington Heights v. National Bank of Austin* (1st Dist. Gen. No. 76-762 (1977)), Ill. App. 3d, N.E.2d, we consider the matter waived. In any event, Kerner never requested a hearing or a final decision until the filing of his claim for reinstatement in 1975. The final decision was made by a duly constituted board after a full hearing. Kerner fails to demonstrate in what manner he was prejudiced by the procedures employed by the board.

The briefs discuss the question of interest on the claim. In view of the disposition which we make of the case, the question becomes moot.

The decision of the circuit court of Sangamon County is reversed.

Reversed.

GREEN, P.J., and REARDON, J., concur.

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IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS SANGAMON COUNTY, SPRINGFIELD, ILLINOIS

OTTO KERNER, by ANTON KERNER, his
representative,

Plaintiff,

v.

STATE EMPLOYEES' RETIREMENT SYSTEM OF ILLINOIS; ELLIOTT EPSTEIN, Director of Finance of the State of Illinois and Trustee and Acting Chairman of the Board of Trustees of the State Employees' Retirement System of Illinois; GEORGE LINDBERG, Comptroller of the State of Illinois and Trustee of the Board of Trustees of the State Employees' Retirement System of Illinois; CLASCENNA HINTON HARVEY, Trustee of the Board of Trustees of the State Employees' Retirement System of Illinois; MICHAEL L. MORY, Secretary of the Board of Trustees of the State Employees' Retirement System of Illinois; and ALAN J. DIXON, Treasurer of the State of Illinois and Treasurer of the State Employees' Retirement System of Illinois,

Defendants.

Administrative Review
No. 299-76

ORDER

Now the matter of the above-entitled cause on Administrative Review before this Court having come on to be heard and the Court having examined the pleadings, report of proceedings, the arguments of counsel and the briefs heretofore submitted by counsel for the respective parties directed to the within Administrative Review, the Court makes the following findings:

1. That this Court has jurisdiction of the parties hereto and the subject matter hereof.
2. That the within entitled cause is concerned with the effect of a conviction of a crime on pension benefits under the State Employees' Retirement System of Illinois.

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3. That the conviction of the former Governor of the State of Illinois, Otto Kerner, occurred after his retirement and during the period that he was receiving his pension under the State Employees' Retirement System of Illinois.

4. That the offenses of which the former Governor of the State of Illinois, Otto Kerner, was convicted are felonies within the meaning of §14-199 of Chap. 108½, Ill. Rev. Stats. 1975.

5. That the Court further finds that the issue involved is the meaning or interpretation of §14-199 of Chap. 108½, Ill. Rev. Stats. 1975.

6. It is the further finding of this Court that until an employee has earned his retirement pay or until the time arrives when he retires, his retirement is an inchoate right.

7. It is the further finding of this Court that when conditions are satisfied at the time of retirement, pay under the retirement plan has become a vested right of which the person entitled to a pension cannot be deprived for the reason that it has ripened or matured into a full contractual obligation.

8. For the reasons stated herein it is the finding of the Court that the findings of the State Employees' Retirement System of Illinois in their Order previously entered on May 5, 1976, disqualifying Otto Kerner by reason of the provisions of the Ill. Rev. Stats. 1975, Chap. 108½, §14-199 should be reversed.

9. It is the further finding of the Court that if this Court's interpretation of said statutory provision is found to be in error then it is the further finding of this Court that the statute, namely, §14-199, Chap. 108½, Ill. Rev. Stats. 1975, is unconstitutional as to the Plaintiff, Otto Kerner, as a violation of his rights under the United States

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Constitution and the Constitution of the State of Illinois in that the Decision and Order of the State Employees' Retirement System of Illinois on May 5, 1976, divests or diminishes or impairs a vested interest.

For the foregoing findings and reasons set out herein IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Decision and Order of the State Employees' Retirement System of Illinois entered on May 5, 1976, terminating the pension of Otto Kerner and denying Otto Kerner of any further pension benefits BE AND IS HEREBY reversed and remanded to the State Employees' Retirement System of Illinois with instructions to pay over to the Estate of Otto Kerner the sum of all arrearages and that he be accorded all benefits and emoluments due him under the State Employees' Retirement System of Illinois in conformance with this Order.

The memorandum opinion of Hon. Paul C. Verticchio, dated 12/1/76 is incorporated herein and attached hereto.

ENTERED this 27th day of December, 1976.

/s/ Harvey Beam
Judge of the Circuit Court

I hereby certify the document to which this certificate is attached is a true and complete copy of the original on file and of record in my office.

Date: December 27, 1976, /s/ Edward W. Ryan, Clerk of the Circuit Court in the State of Illinois and County of Sangamon.

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CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT ILLINOIS

December 1, 1976

Robert Weiner, Esquire
Attorney at Law
1227 South Seventh Street
Springfield, IL 62703

M. Brooks Byus, Esquire
Assistant Attorney General
500 South Second Street
Springfield, IL 62706

RE: OTTO KERNER, etc.

vs.

STATE EMPLOYEES' RETIREMENT SYSTEM
OF ILLINOIS, et al.

No. 299-76 Administrative Review

Gentlemen:

The Court has examined the pleadings, the Report of Proceedings, the arguments of counsel and the briefs directed to the Administrative Review of the above-captioned case.

It is agreed that this case is concerned with the effect of a conviction of a crime on pension benefits under the State Employees' Retirement System. The facts are not in controversy. It is unrebuted that the conviction of the former Governor of the State of Illinois, Otto Kerner, occurred after his retirement and during the period that he was receiving a pension under the State Employees' Retirement System.

The Plaintiff in their brief directs some argument to the issue that the felonies involved herein are not within the scope of Chapter 108½, paragraph, 14-199.

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It is the finding of the Court that the said offenses are felonies within the said statute. The pertinent statutory provision reads as follows:

"Felony conviction. None of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as an employee.

This section shall not operate to impair any contract or vested right heretofore acquired under any law or laws continued in this Article nor to preclude the right to a refund.

All future entrants entering service subsequent to July 9, 1955 shall be deemed to have consented to the provisions of this section as a condition of coverage."

It is further the finding of this Court that the issue involved is the meaning or interpretation of Illinois Revised Statutes 1975, Chapter 108½, paragraph 14-199.

It is the finding of this Court that until an employee has earned his retirement pay or until the time arrives when he retires, his retirement pay is an inchoate right.

It is further the order of the Court that when conditions are satisfied at the time of retirement, pay under the retirement plan has become a vested right of which the person entitled to a pension cannot be deprived. It has ripened or matured into a full contractual obligation.

Pursuant to the above findings, the findings of the State Employees' Retirement System in an order herein entered disqualifying Otto Kerner under the provisions of the Illinois Revised Statutes 1975, Chapter 108½, paragraph 14-199, are reversed.

It is further the finding of the Court that if the above interpretation of the trial court is in error, then the said statute is unconstitutional as to the Plaintiff, Otto Kerner,

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as a violation of the United States Constitution and the Constitution of the State of Illinois in that it divests or diminishes or impairs a vested interest.

Counsel for the Plaintiff is directed to prepare an order pursuant to the above findings and present the said order to the Honorable Judge Harvey Beam as Presiding Judge of Sangamon County in the absence of this Judge due to retirement.

The Court has on this date entered the following docket order:

"Cause called for further hearing. Findings of the State Employees' Retirement System reversed for reasons set out in Court's opinion of December 1, 1976. Cause continued for presenting of written order to the Honorable Harvey Beam, Presiding Judge of Sangamon County."

Sincerely yours,
/s/ Paul C. Verticchio
Circuit Judge

PCV*df

cc: The Honorable Harvey Beam
Presiding Judge of Sangamon County
Room 411 County Building
Springfield, IL 62701

Court file

APPENDIX 25

BEFORE THE STATE EMPLOYEES' RETIREMENT SYSTEM OF ILLINOIS

IN THE MATTER OF OTTO KERNER, }
Petitioner. } No. 1

SUPPLEMENTAL DECISION OF HEARING OFFICER, MANUEL J. ROBBINS

NATURE OF ADDITIONAL PROCEEDINGS

The undersigned Hearing Officer has heretofore conducted hearings on the petition filed by Otto Kerner demanding the resumption of his pension payments and for payment of pension arrearages and benefits thereunder and the answer and demand for refund filed by the Retirement System.

On April 23, 1976 the undersigned rendered a decision that Otto Kerner under his contractual relationship with the State Employees' Retirement System of the State of Illinois and under the provisions of Article 14, Chap. 108½ of the Illinois Revised Statutes acquired a vested enforceable interest in his pension which cannot be terminated, forfeited, diminished or impaired. The Hearing Officer recommended that Otto Kerner's application for service retirement allowance had been accepted by the Retirement System which he was a member in good standing, that his vesting was complete and that he was entitled to receive resumption of his pension payments and payment of all arrearages, benefits and emoluments.

On May 5, 1976 at a meeting of the Board of Trustees of the State Employees' Retirement System of the State of Illinois a unanimous decision of the Trustees was made denying the request of Otto Kerner for the resumption of

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his pension payments and for the payment of any pension arrearages and benefits thereunder.

By motion approved on May 5, 1976, at said meeting of the Board of Trustees it was requested that Manuel J. Robbins, Hearing Officer, review the record and make a recommendation as to whether or not the Board of Trustees of the State Employees' Retirement System of the State of Illinois has the power and obligation to seek repayment of such service retirement allowance payments made to Otto Kerner in excess of his contributions made to the System. In arriving at his Supplemental Decision the Hearing Officer was instructed not to utilize his own prior decision as a foundation for his supplemental decision. Instead the Hearing Officer was requested to use as a foundation and as a sole consideration for his supplemental decision the ruling of the Board of Trustees of the State Employees' Retirement System of the State of Illinois made on May 5, 1976 denying the petition of Otto Kerner to reinstate his service retirement allowance payments, and to use said Board of Trustee's decision as the sole basis for his supplemental decision.

A copy of the letter of May 18, 1976 of Michael L. Mory, Executive Secretary containing said instructions is attached hereto as Exhibit A.

FINDINGS AND CONCLUSIONS

Section 14-199 of Chap. 108½ of the Illinois Revised Statutes states as follows:

"Felony Convictions. None of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as an employee."

"This section shall not operate to impair any contract or vested right heretofore acquired under any

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law or laws continued in this Article nor to preclude the right to a refund."

"All future entrants entering service subsequent to July 9, 1955 shall be deemed to have consented to the provisions of this section as a condition of coverage."

The Board of Trustees of the State Employees' Retirement System of Illinois has decided that Otto Kerner did not have an enforceable vested interest in his pension and that therefor his pension can be terminated. Said decision further ordered that his pension payments be permanently terminated and that Otto Kerner be denied any further pension benefits. Since the Board of Trustees has so interpreted Section 14-199 of Chap. 108½ of the Illinois Revised Statutes then it follows as a matter of course that the language of the first paragraph of Section 14-199 shall apply.

"None of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as an employee . . ." (emphasis added)

Therefore, since the Statute is construed as prohibiting the payment to any person in this category and the Board of Trustees of the State Employee's Retirement System of the State of Illinois has already terminated Otto Kerner's pension benefits it has the power and obligation to seek repayment of such service retirement arrearage payments made to Otto Kerner in excess of his contribution made to the State Employees' Retirement System of the State of Illinois.

Respectfully submitted,
/s/ Manuel J. Robbins
Hearing Officer

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EXHIBIT A

STATE EMPLOYEES' RETIREMENT SYSTEM
OF ILLINOIS

1201 South Fifth Street, Springfield 62706 217/782-7008

May 18, 1976

Mr. Manuel J. Robbins
Robbins, Coe, Rubinstein & Shafran, Ltd.
Attorneys at Law
Brunswick Building, 33rd Floor
69 West Washington Street
Chicago, Illinois 60602

Re: Otto Kerner Hearing

Dear Mr. Robbins:

In accordance with a motion approved at the May 5, 1976 meeting of the Board of Trustees, I am hereby requesting that you review the record and make a recommendation as to whether or not the Board of Trustees has the power and obligation to seek repayment of such Service Retirement Allowance payments vouchered to Otto Kerner in excess of his contributions made to the System. In making this recommendation you should take into consideration the decision of the Board as rendered during the May 5, 1976 meeting denying the petitioner's request to reinstate Service Retirement Allowance payments.

I am, by copy of this letter, advising counsel for the petitioner that should he wish to introduce additional evidence relating to the question of repayment of Service Retirement Allowance payments in excess of Mr. Kerner's contributions that he submit such evidence or argument directly to you as Hearing Officer. Since we are now anticipating another meeting of the Board of Trustees by the

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middle of June, I would hope that you could render this recommendation within the next two to three weeks. To expedite matters, I would suggest that you mail the recommendation directly to each trustee.

Should you have any questions regarding the scope of this further review, please let me know.

Very truly yours,
/s/ Michael L. Mory
Executive Secretary

MLM:bcb
cc: Mr. Robert Weiner

BEFORE THE STATE EMPLOYEES'
RETIREMENT SYSTEM OF ILLINOIS

IN THE MATTER OF OTTO KERNER, } No. 1
Petitioner. }

AFFIDAVIT OF MAILING

TO: Mr. Elliott Epstein, Acting Chairman
Director of Finance of the State of Illinois,
Trustee, State Employees' Retirement System of Ill.
160 North LaSalle Street, Chicago, Illinois 60601.

Mr. George Lindberg
Comptroller of the State of Illinois,
Trustee, State Employees' Retirement System of Ill.
(Attention: Dan McCarthy),
Capitol Building, Springfield, Illinois 62706.

Ms. Clascenna Hinton Harvey,
Trustee, State Employees' Retirement System of Ill.
2100 Cherry Road, Springfield, Illinois 62706.

Mr. Michael L. Mory, Secretary,
State Employee's Retirement System of Illinois
1201 S. 5th Street, Springfield, Illinois 62706.

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Mr. Alan J. Dixon, Treasurer of the State of Illinois,
Trustee, State Employees' Retirement System of Ill.
Capitol Building, Springfield, Illinois 62706.

Mr. Nolan B. Jones,
Director, Department of Personnel,
Capitol Building, Springfield, Illinois 62706.

Jacqueline K. Nejmanowski, Attorney,
State Employees' Retirement System of Illinois,
1201 S. 5th Street, Springfield, Illinois 62705.

Robert Weiner, Esq., Attorney,
1227 S. 7th Street, P.O. Box 399, Springfield, Ill. 62705.

MANUEL J. ROBBINS certifies that on this 7th day of June, 1976, a copy of the attached Supplemental Decision of Hearing Officer was served upon each of the above named individuals at the addresses above shown by dropping the same in the United States Mails at Chicago, Illinois, with proper postage affixed thereto.

/s/ Manuel J. Robbins

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BEFORE THE
STATE EMPLOYEES' RETIREMENT SYSTEM
OF ILLINOIS

IN THE MATTER OF OTTO KERNER, }
Petitioner. } No. 1

DECISION OF HEARING OFFICER,
MANUEL J. ROBBINS
NATURE OF PROCEEDINGS

This matter comes on to be heard before the State Employees' Retirement System of Illinois ("Retirement System") on a petition filed by Otto Kerner ("Kerner"), demanding the resumption of his pension payments and for the payment of any pension arrearages and benefits thereunder.

The Retirement System has answered the petition, indicating it had rightfully withheld said payments because Kerner had been convicted of a felony and, under the provisions of Section 14-199, Chapter 108½ of the Illinois Revised Statutes, said payments should be withheld because Kerner had been convicted of one or more felonies. The Retirement System also claims that it is entitled to repayment from Kerner of the sum of \$2,112.11, representing the difference between the total amount of benefits received by Kerner and the amount of Kerner's accumulated contributions in the retirement system.

The purpose of the hearing is to recommend to the Retirement System a final administrative decision under the appropriate provisions of Article 14, Chapter 108½ of the Illinois Revised Statutes covering Pensions for the State Employees' Retirement System of Illinois.

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A hearing was conducted by the undersigned, MANUEL J. ROBBINS ("Robbins"), in Springfield, Illinois, on February 2nd and 3rd, 1976. A full transcript of the hearing has been prepared and is attached to and made part of the record. Petitioner, Kerner, has introduced Exhibits 1 through 25. The Retirement System has introduced Exhibits 1 through 10. All of the exhibits have been made part of the record, as indicated in the transcript.

STATEMENT OF FACTS

On September 28, 1965, Kerner, then Governor of the State of Illinois, applied for membership in the Retirement System under the provisions of Article 14, Chapter 108½, of the Illinois Revised Statutes, as amended. Kerner voluntarily entered the Retirement System by paying therein, including 4% interest, the sum of \$11,048.34. By exercising his option to membership in the system, Kerner obtained service credits back to his original date of employment, or date of taking office: January 9, 1961.

On May 19, 1968, Kerner resigned from his position as an employee of the State of Illinois.

On May 2, 1969, Kerner applied to the Retirement System for a service retirement allowance and requested that it commence as of January 14, 1969.

On June 16, 1969, the Retirement System notified Kerner that his application for a service retirement allowance had been approved by the Claims Committee and authorized for payment in accordance with the law governing the system. Kerner was assigned membership record number 112934, and a voucher in the amount of \$1,534.88, in payment of his allowance for the period of January 14, 1969 through May 31, 1969, was forwarded to him. He was advised by the Retirement System that his service retire-

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ment allowance amounted to \$4,020.96 per year, or \$335.08 per month, and was to continue through life. The same notice informed Kerner that, for the purpose of determining his income tax liability, his contributions to the retirement system, excluding interest, totalled \$16,815.71. Thereafter, for the months of June, 1969 through June, 1973, Kerner received monthly pension payments in the sum of \$335.08 each, amounting to a total of \$16,418.92. Kerner also received the sums of \$324.42 for the months of September, 1973 and May, 1974, and \$325.18 for the month of August, 1974, totaling \$974.02. At the time of the hearing on February 2, 1976, Kerner had received gross pension payments amounting to \$18,927.82. For the period commencing July 1, 1973, up to the time of the hearing on February 2, 1976, Kerner had failed to receive 28 pension payments for the total sum of \$9,382.24.

Kerner has been convicted of one or more felonies in case number 71 CR 1086, U.S.A. vs. OTTO KERNER, JR., in the United States District Court for the Northern District of Illinois, Eastern Division, which convictions have been affirmed by the higher courts. The felony convictions, alleging violations of various sections of the United States Code, related to or arose out of or were in connection with Kerner's service as an employee of the State of Illinois.

ISSUES

I. Does Otto Kerner have a contractual relationship with the State Employees' Retirement System of Illinois which would give him a vested interest in his accumulated contributions to the System?

II. Is Otto Kerner's pension a bounty or reward, or deferred compensation arising out of an enforceable contract right which has given him a vested interest in his pension?

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III. Does the language of Section 14-199, Chapter 108½ of the Illinois Revised Statutes, "convicted of any felony," include a conviction under the United States Statutes, or does it only refer to conviction of a felony under the laws of the State of Illinois?

IV. Is the Retirement System legally authorized to withhold pension payments and terminate Kerner's pension under the provisions of Section 14-199, Chapter 108½ of the Illinois Revised Statutes, by reason of his felony conviction?

V. If Kerner has a vested right to the pension, can it be terminated legally under the provisions of Section 14-199, Chapter 108½ of the Illinois Revised Statutes, and the Illinois and United States Constitutions?

FINDINGS AND CONCLUSIONS

This is a case of first impression in the State of Illinois. The Retirement System alleges that an administrative agency and its hearing officer do not have the authority or jurisdiction to hear or rule upon any judicial or constitutional questions relating to the applicability of the statutes to the matter of Otto Kerner.

While an administrative agency does not have the right to exercise inherent judicial powers, or judicial functions solely within the realm of the judiciary, it has a duty to take cognizance of the rights created by contract, and has the obligation to interpret contractual rights and obligations between an individual and the State of Illinois created by the applicable statutes it has the duty to Administer.

A statute cannot be administered or interpreted in a vacuum, but must be construed according to the available guidelines and reasonable interpretations provided by the

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language of the various portions of the statute, the available case law which has already interpreted the various legal principles involving pensions, as well as the guidelines of the Illinois and United States Constitutions. See *Giger v. Board of Fire and Police Commissioners*, 23 Ill. App. 2d 433, 435, wherein it is stated by the court:

"A hearing before an administrative agency on charges filed against an individual should not be a partisan hearing with the agency on one side arrayed against the individual on the other, but instead it should be an investigation instituted for the purpose of ascertaining and making findings of fact, and a fair consideration should be given to the individual's objections and his opportunity to be heard should not be limited in scope."

A number of Illinois decisions have made it clear that a government employees' retirement system which provided for optional contributions from employees, changed that retirement system from a bounty or gratuity for meritorious service to a deferred compensation arising out of a contractual relationship which ultimately results in vesting of said rights and becoming a property right, a pension right that cannot be forfeited.

See:

People ex rel. Judges Retirement System of Illinois v. Warren Wright, State Treasurer, as Treasurer of Judges Retirement System of Illinois, (1942), 379 Ill. 328, 337;

Douglas C. Ridgeley v. Board of Trustees of State Institutions Teachers' Pension and Retirement Fund, (1939), 371 Ill. 409;

S. E. Raines v. Board of Trustees of the Illinois State Teachers' Pension and Retirement Fund, (1937), 365 Ill. 610, 614;

Peters v. City of Springfield, (Rehearing denied May 31, 1974), 57 Ill. 2d 142, 311 N.E.2d 107.

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In the opinion of the undersigned hearing officer, there are two kinds of vesting under the contract rights of Kerner in the Retirement System, as provided by Article 14, Chapter 108½, of the Illinois Revised Statutes:

First, there is the immediate vesting in the accumulated contributions paid to the Retirement System by Kerner and the deductions from his salary voluntarily agreed to by Kerner as a state employee, and as authorized and prescribed by the appropriate paragraphs of Article 14 of Chapter 108½ of the Illinois Revised Statutes.

Second, there is the ultimate vesting in retirement benefits which arises in the following set of circumstances: Kerner, an employee of the Retirement System and covered by the pension system, under his contract rights, became eligible for retirement and applied for pension retirement benefits under the provisions of and in compliance with Article 14, Chapter 108½ of the Illinois Revised Statutes. On May 2, 1969, Kerner, then a member in good standing of the Retirement System, made an application for service retirement allowance to the Board of Trustees of the Retirement System. Under the powers vested in the Claims Committee of the Retirement System, the application of Kerner for a service retirement allowance was approved and authorized for payment in accordance with the law governing the system. A membership record number: 112934, was assigned, and a valid and binding agreement was made on behalf of the Retirement System to pay Kerner monthly service retirement allowance payments through life. At that moment, the provisions of Section 14-193 went into effect:

"Authorizations. Members shall, by virtue of the payment of the contributions required to be paid to this system, receive a vested interest in *the accumulated contributions in the system*, and, in consideration

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of such vested interest, each member is deemed to have agreed to and authorized the deductions from salary of all contributions payable to this system.

Payment of salary as prescribed by law or as contracted by a department, less the amounts of contributions provided in this Article, shall, together with such special vested rights, be a full and complete discharge of all claims of payments for service rendered by a member to the State during the period covered by any such payment." (emphasis added)

The statute does not say a vested right in "his" accumulated contributions to the system, as the State has quoted, but indicates a vested right in "*the*" accumulated contributions of the system. This vested right of Kerner's, is a binding obligation on the Retirement System and cannot be forfeited, diminished or terminated.

Article 13, Section 5, of the Illinois Constitution, 1970, Pension and Retirement Rights, states that:

"Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

The Retirement System has cited as the reason for termination of pension payments and benefits, the felony conviction of Kerner. Section 14-199 of Chapter 108½ of the Illinois Revised Statutes states as follows:

"Felony Conviction. None of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his services as an employee.

This section shall not operate to impair any contract or vested right heretofore acquired under any law or laws continued in this Article nor to preclude the right to a refund."

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It is the opinion of the hearing officer that the language of paragraph 1 of Section 14-199, namely, "none of the benefits provided for shall be paid to any person convicted of *any felony* relating to or arising out of or in connection with his service as an employee," includes a conviction under the federal statutes as well as the statutes of the State of Illinois.

It is the opinion of the hearing officer that the second paragraph of Section 14-199 limits the applicability of the first paragraph, restricting payment of benefits where the effect of the first paragraph would be to "impair any contract or vested right heretofore acquired under any law or laws contained in this Article."

It is the further opinion of the hearing officer that the language of the second paragraph of Section 14-199 takes into account and mentions two sets of events which would arise from the two types of vesting:

(A) Where the termination under paragraph 1 of Section 14-199 occurs before the employee-member has retired, prior to his application for service retirement being accepted or approved by the Retirement System.

Under these conditions, the vesting is solely in the employee's own accumulated contributions to the System. The employee-member then only has a vested right to a refund of his accumulated contributions to the Retirement System and would not have a vested right to a retirement allowance.

(B) Where an employee has met all of his obligations as an employee-member and, while a member in good standing, has applied for a service retirement allowance and his application for service retirement allowance has been accepted by the Retirement System.

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Under these circumstances, the first portion of paragraph 2 of Section 14-199 prohibits impairment of contract rights or vested rights "heretofore acquired". The employee-member has then acquired a vested interest.

When this occurs, the vesting is complete, and the member has a vested interest in the "accumulated contributions in the system" as described by Section 14-193 of Chapter 108½ of the Illinois Revised Statutes. He has a vested retirement allowance arising out of a contractual relationship. This benefit cannot be forfeited, terminated, diminished or impaired.

See: *Leonard v. Seattle*, (1972), 503 P.2d 741, where the court stated, at page 746:

"We accept the city's contention to the extent that the retirement pension is contractual in nature; but that does not mean that once vested the right to the pension does not constitute a part of the recipient's estate. That the retirement pension arises out of a contract of employment does not deprive it of the characteristics of property, but rather imparts to it that very characteristic by removing it from the status of a gratuity, mere expectancy, or simply a promise enforceable ultimately by no more than a judgment for damages.

As this court said in *Bakenhus*, at page 698, 296 P.2d at page 538:

In this state, a pension granted to a public employee is not a gratuity but is deferred compensation for services rendered. The contractual nature of the obligation to pay a pension when the employee has fulfilled all of the prescribed conditions was recognized in *Luellen v. Aberdeen*, 1944, 20 Wash. 2d 594, 148 P.2d 849 . . ."

Also see *Ballard v. Board of Trustees of Police Pen. Fund of the City of Evansville, Indiana* (Rehearing denied

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August 9, 1974), 313 N.E.2d 351, where the court stated, at page 355:

"... As fully ripened, plaintiff's pension constituted property — the present right to payment of his deferred compensation. When his rights to the pension fully vested, he acquired enforceable rights to funds under the control of the trustees according to his contract, and these rights thus finally vested constituted property not to be divested or defeated by means or for other reasons or on different grounds than those upon which any other kind of property could be alienated or defeated."

It is, therefore, the decision of this hearing officer that Otto Kerner became an employee-member of the Retirement System on September 28, 1965, at which time he became an employee-member in good standing. While in good standing, on May 2, 1969, Kerner applied to the Retirement System for a retirement service allowance. On June 16, 1969, a notification was forwarded to Kerner, duly authorized by the Retirement System, accepting Kerner's application for service retirement allowance, approved by the Claims Committee, and authorized for payment in accordance with the laws of Illinois involving the Retirement System. At that time, Kerner, under his contractual relationship with the Retirement System, and under the provisions of Article 14, Chapter 108½ of the Illinois Revised Statutes, acquired an enforceable vested interest

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in his pension, which cannot be terminated. Therefore, Otto Kerner is entitled to receive:

- (a) resumption of his pension payments;
- (b) payment of all pension arrearages, benefits, and emoluments.

Respectfully submitted,
/s/ Manuel J. Robbins
Hearing Officer

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